

**IN AND BEFORE THE
FEDERAL ELECTION COMMISSION**

IN RE:

**Gallagher for Senate and
Kenneth Lancaster, in his official
capacity as Treasurer,
Respondent**

MUR 5709

**Respondent's Reply Brief to Probable Cause Brief of the Office of General Counsel
and Request for Hearing**

This Matter Under Review 5709 ("the MUR") arises from an amendment to the July 2004 Quarterly FEC Report ("the Report") of and filed by Respondent Gallagher for Senate Committee ("the Committee").¹

The Office of General Counsel ("OGC") of the Federal Election Commission ("FEC" or "the Commission") has submitted to Respondent its Brief in support of its recommendation that the Commission find probable cause to believe that the Committee has violated the Federal Election Campaign Act of 1971, as amended ("the Act").

The Committee submits this Reply Brief in opposition to the probable cause finding and urges the Commission to dismiss the MUR.

The Committee further requests a hearing before the Commission pursuant to 72 Fed. Reg. 7551 (Feb. 16, 2007) for the reasons set forth more fully below.

Facts of the MUR

The Committee made three (3) disbursements in June, 2004, which were inadvertently omitted from the Report. The Committee has advised the OGC (repeatedly) that the error was inadvertent and resulted from a manual bookkeeping system and human error.

First, it should be noted by the Commission that the error in the Report was discovered and remedied by the Committee *sua sponte*. The error was unintentional. See copies of the *Affidavits of Patti Thompson, Richard Pinsky, Kenneth Lancaster*, originals of which were attached to the Committee's Reason to Believe Response. The affidavits of these individuals

¹ Kenneth Lancaster has been named in the MUR in his official capacity as Treasurer of the Committee

RECEIVED
FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL
JUL 17 2007

collectively set forth the verified facts of how the mistake was made, how it was corrected by the individuals involved with the Committee *and* how it was reported to the Commission.

The explanation regarding *how* the error occurred is quite simple: at the time of the filing of the Report, the records of the Committee's receipts and disbursements were maintained manually in hard copy files, with disbursements files by vendor. FEC reports were prepared by hand, manually retrieving and entering information from the files. The particular file containing the information regarding the three (3) wire transfers was not kept with the vendor files but rather with bank files. See *Affidavit of Patti Thompson*, paragraphs 8 and 9.

A few weeks after the Report was filed by the Committee, Ms. Thompson discovered the separate folder with the three (3) wire transfer documents and realized that those disbursements had been inadvertently omitted from the Report. Immediately upon discovery, Ms. Thompson advised the undersigned Committee counsel as well as Mr. Lancaster, the Committee treasurer, and Mr. Pinsky, the General Consultant to the Committee of her mistake.

Steps were immediately instituted to begin preparation of amendment(s) to the Report, as well as hiring a bookkeeper (at the treasurer's insistence) in order to automate the Committee's bookkeeping. Upon the recommendation of the Committee's counsel, the treasurer also oversaw the reconciliation of the previously filed FEC Reports to the Committee's bank accounts in order to insure that no other errors or omissions existed and to prepare such other amendments to the FEC reports as might be necessary, such that all filings would be correct and could be filed simultaneously. See *Affidavits of Kenneth Lancaster, Patti Thompson and Richard Pinsky*.

The Report was amended on September 9, 2004, which disclosed the previously omitted disbursements. The amendment was filed less than thirty (30) days following the discovery of the error. Disclosure of the mistake was purely voluntary on the part of the Committee and the treasurer.

The FEC did *not* discover the mistake nor is it likely the Commission would ever have discovered the mistake absent the self-correction and self-reporting of the error by the Committee, its staff and its treasurer.

The Committee and, in particular, its treasurer, Mr. Lancaster, took all necessary steps to insure that the Report was amended and the correct information was properly disclosed to the Commission.

Arguments

1. **The Committee should not be punished for voluntarily disclosing its error to the Commission.**

It is impossible for the Commission to audit every political committee and every report filed by every political committee every year. The Commission *must* rely, therefore, on voluntary compliance with the Act in order for the regulatory process involving campaigns and reporting to function. In that regard, the Commission and Commissioners have historically

29044224699

recognized that the reporting functions under FECA are, essentially, a *voluntary* compliance system. See Heritage Foundation Lecture #732, February 13, 2002 by (then) FEC Chairman David M. Mason, "*Campaign Finance Reform: Broad, Vague, and Unenforceable*":

"...let me remind you that the federal income tax system is voluntary. What is meant by a "voluntary" tax system is not that paying is voluntary, but that each taxpayer keeps his own records and calculates his own taxes, rather than having the IRS do so. Every regulatory and police agency relies on voluntary compliance in this sense. In fact, most political parties, PACs, candidates, corporations, and unions are resigned if nothing else to complying with whatever laws Congress writes and whatever regulations the FEC imposes. As an agency, we spend a significant portion of our budget on publications and seminars aimed simply at *informing* these groups what the law requires." (emphasis added)

Voluntary compliance by the regulated community is absolutely essential for the Commission to be able to do its job properly. Such a voluntary system presupposes that filers be authorized and encouraged to self-monitor and self-report mistakes, without fear of reprisal or penalty.

Numerous federal agencies have established elaborate and formal systems for *encouraging* and *rewarding* self-reporting and self-monitoring. For instance, in 1995 the Environmental Protection Agency ("EPA") issued its Final Policy Statement on "Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations", 60 FR 66706, December 22, 1995, in which the EPA established a *formal* process for encouraging and rewarding self-reporting of violations. Since the effective date of the policy ten years ago (January 22, 1996), the EPA has waived civil penalties in numerous cases in which companies self-reported violations involving mistakes or omissions in reporting, such as failure to properly disclose presence of chemicals on a site (*see* 2003 WL 23674761 (EPA)), saying, "This is a great example of how the EPA supports industries that identify and correct violations."). The EPA in 2003 waived \$1.4 million in fines against eleven companies for failure to submit proper Toxic Inventory Forms, failure to file accidental release(s) of hazardous chemicals reports, and similar reporting violations (*see* 2003 WL 23573751 (EPA)). In fact, the Environmental Protection Agency has issued numerous public statements in the past decade relying on the voluntary monitoring and self-reporting policy as a means of *enhancing* enforcement.

Other federal agencies have likewise adopted similar policies, ranging from the Securities and Exchange Commission, the Federal Energy Regulatory Commission, the Commodities Futures Trading Commission, among others. All have promulgated such policies in the belief that voluntary compliance and enforcement are enhanced by encouraging self-reporting of mistakes.

Here, the FEC is doing just the opposite: *punishing* a committee for voluntarily reporting an error in its filings, for no reason *other* than the fact that an error was made. There are no additional circumstances to warrant punishment *other* than some 'strict liability' standard which appears to hold that any error over a certain amount is punishable by threat of personal and ultimately monetary sanction.

29044224700

The FEC should follow the examples of other agencies in encouraging voluntary self-correction and self-reporting. But no formal 'policy' is even necessary to accomplish that purpose. However, if the Commission wishes to follow a diametrically opposite path it should proceed to punish this Committee. The message(s) the Commission has been sending increasingly to the regulated community is "don't tell us what you've done wrong because if you do, you're going to be in trouble..." That is certainly what this MUR and proposed civil penalty signals.

The Committee urges the Commission to exercise the common sense to dismiss this MUR as a prime example of 'encouraging' rather than discouraging voluntary compliance, self-monitoring and self-reporting.

A current initiative undertaken by the Office of Management and Budget involves a program of evaluation and review of federal agencies' effectiveness in a variety of areas. The description of the "Program Assessment Rating Tool" (PART) is a standard questionnaire which asks approximately 25 questions about a program's performance and management. For each question, there is a short answer and a detailed explanation with supporting evidence. The answers determine a program's overall rating. Once each assessment is completed, a program improvement plan is developed and published regarding each federal agency and its programs.

According to the PART assessment, the Federal Election Commission's program performance reveals a "Results Not Demonstrated" rating with regard to the issue of whether the Commission "met its annual performance goals, increasing enforcement activity and promoting voluntary compliance." See www.ExpectMore.gov, Office of Management and Budget website (<http://www.whitehouse.gov/omb/expectmore/summary>, accessed April 14, 2006). The reason for the rating is that the Commission has not established a program of voluntary compliance which, according to OMB, undermines the enforcement capabilities of the Commission.

The instant case is a demonstrable example of the failure of the Commission to encourage voluntary compliance and reporting of errors or mistakes. The Commission should be required to advise the OMB of its deliberate efforts to punish, rather than reward, voluntary self-compliance by the regulated community.

The error in this instance was a simple mistake, which the Committee with the active leadership and assistance of its treasurer, Mr. Lancaster, corrected.

If the Commission's new standard is to punish *any* mistake on a reporting form, the Commission should promulgate that standard and announce that its new rule is 'zero tolerance' for mistakes, with a published schedule of fines based on the type and size of mistakes that are to be automatically punished.

There is no need for an enforcement proceeding such as this one that drags on for years after the Committee has filed its Termination Report. The Commission should publicly announce its no errors or omissions policy clearly and forcefully such that all Committees are well-advised of this new standard. Then, every committee will know in advance the risks of filing amendments to its reports.

Any further penalty (above and beyond and in addition to the costs already incurred by addressing and responding to the MUR) will have the exact opposite result of encouraging voluntary compliance: it will, instead, send a signal to the regulated community NOT to report mistakes, particularly ones involving amounts over the "Secret Number" known only to the Commission and its staff, because that will trigger an enforcement action. Surely that is not the message the Commission wants the regulated community to hear.

II. The Committee was largely funded by the candidate and the wire transfer expenditures at issue were included in the FEC Form 10 report publicly disclosed via the *Millionaires Amendment* more than a month before the Report was filed.

On June 15, 2004, the candidate, Doug Gallagher, notified the United States Senate and all primary opponents of expenditures on that date from his personal funds in the total amount of \$2,567,250.00, pursuant to the reporting requirements of 11 CFR §400.21(a) for candidates making an initial expenditure of personal funds that exceed two times the threshold amount as defined in 11 C.F.R. §400.9. See Attached Form 10, filed June 15, 2004.

Thus, well before the Report was filed by the Committee on July 15, 2004, the *entire* amount of the candidate's personal funds disbursed on June 15, 2004 had already been publicly disclosed, *including* the wire transfers at issue in this MUR.

The Committee made an error, discovered and reported it *sua sponte*, and the disbursement of the funds had already been publicly disclosed on a separate reporting form to the public, the Commission and the other candidates in the primary.

So the issue for the Commission remains: why exactly does the Committee deserve to be punished?

The particular disbursements by the Committee were already a matter of public record before the initial *or* the amended reports were filed. There is not a scintilla of evidence that any person or committee was adversely affected by the mistaken failure to include the wire transfers on the Report.

The Committee did not 'hide' its disbursement of the funds at issue and should not now be subject to penalty by the Commission for its mistake.

III. The Commission should conduct a hearing in this case in order that Respondent can focus the Commission's attention on the dangers of imposing penalties for self-reporting of mistakes by this Committee.

There appears to be an increasing tendency by the Commission to punish committees for filing amended FEC reports depending on the amount of the amendment.

29044224702

The standard understood by committees in the past has been that they do the best they can (most often with volunteers or non-professionals preparing the FEC reports) and then if any errors or supplemental information arises that require subsequent amendments, such necessary amendments correcting the mistakes or updating the information are prepared and filed – and encouraged by the Commission.

However, that standard appears to have changed with *no* actual notice of the change in the standard *other* than observing that, increasingly, no self-correcting action seems to go unpunished.

Such a changed standard is at odds with the Commission's recently enacted *Policy Regarding Self-Reporting of Campaign Finance Violations (Sua Sponte Submissions)*, 72 Fed. Reg. 16695 (April 5, 2007). The Commission summarized its intent with respect to self-reporting as follows: "The Commission seeks to encourage the self-reporting of violations. To that end, the Commission has adopted this policy that explains that *sua sponte* submissions will, in general, receive more expedited processing and more favorable outcomes than identical matters arising by other means." See 72 Fed. Reg. 16695 @ 16698

The instant proceeding began prior to the Commission's adoption of the *Sua Sponte Policy*; however, this would be a good opportunity for the Commission to demonstrate to the regulated community that self-reporting of mistakes is also welcomed and encouraged, rather than punished as a matter of course.

This Committee requests the opportunity to make these arguments to the Commission in person and to fully advise the Commission in these premises on each of the issues set forth above..

CONCLUSION

Accordingly, and for the reasons set forth herein, the Respondent respectfully requests a hearing in this matter, moves the dismissal of MUR 5709 and for all other appropriate and necessary relief.

Respectfully Submitted,



Clea Mitchell, Esq.
Counsel for Respondent,
Gallagher for Senate,
Kenneth Lancaster in his official
capacity as treasurer

Dated: June 1, 2007

06/16/2004 15:19 380667793

24038430660 U.S. SENATE

PAGE 02

06/11/2004 17:48 FAX

0003

FEC FORM 10**24-HOUR NOTICE OF EXPENDITURE FROM CANDIDATE'S PERSONAL FUNDS (1) CTR 400.21 and 400.22**
(Mandatory Attachment)

1. Name of Candidate	2. Office Sought	3. State	4. District	5. Candidate ID Number
Doug Gillingham	Senate	FL		84FL00344
6. Name of Principal Campaign Committee				7. Committee ID Number
Gillingham For Senate				C 00396234
8. Address				
1500 San Lane Avenue, Suite 150				
9. City, State and ZIP Code				
Gard City, FL 33146				

10. Breakdown of Personal Funds of the candidate (see instructions for different elections, submit a separate Form 10 for each election.)

Aggregate Expenditures Previously Reported During the Election Cycle

DATE	ELECTION	AMOUNT	CHECK FLOWTHROUGH
A	Primary General Other		
B	Primary General Other		
C	Primary General Other		
D	Primary General Other		

11. Total Expenditures With Parties 2,367,250.00

12. Total Expenditures Election Cycle To Date 2,367,250.00

13. Signature of Candidate or Agent

Kenneth Zencusky

Signature of Candidate or Agent		Date
<i>Kenneth M. Zencusky</i>		June 16, 2004
Do not write in this space. Federal Election Commission, 1100 L Street, NE, Washington, DC 20002 Tel: 202-453-4300, TDD: 202-453-4300		

FEC Form 10-03b (2002)

JUN-16-2004 20:34

380667793

07%

P.02

29044224703